Supreme Court, U.S.
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No. 06-548

In The

Supreme Court of the United States

MARIAN P. OPALA,

Petitioner,

v.

JOSEPH M. WATT et alii,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioner's request to declare unconstitutional an internal rule of the Supreme Court of Oklahoma is redressable by the federal court.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Tenth Circuit.

The Petitioner here and Appellee below is Justice Marian P. Opala.

The Respondents here and Appellants below are Chief Justice Joseph M. Watt (re-elected chief justice November 4, 2004), Justice James R. Winchester (elected vice-chief justice November 4, 2004), Justice Robert E. Lavender, Justice Rudolph Hargrave, Justice Yvonne Kauger, Justice James E. Edmondson, Justice Steven W. Taylor, and Justice Tom Colbert.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THE CASE

Opala v. Watt, 454 F.3d 1154 (10th Cir. July 21, 2006). Appendix 1a.

Opala v. Watt, 393 F.Supp.2d 1154 (W.D.Okl. 2005). Appendix 14a.

JURISDICTION

The Court of Appeals for the Tenth Circuit entered its judgment on July 21, 2006. Appendix 1a. Petitioner Justice Marian P. Opala ("Opala") seeks review of that judgment on a writ of certiorari.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON BY PETITIONER

Petitioner's suit was brought under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, alleging violations of his rights under the Constitution of the United States, Equal Protection Clause, Amendment V, and Due Process Clause, Amendment XIV.

STATEMENT OF THE CASE

Justice Marian P. Opala respectfully requests the Court to issue a writ of certiorari to review the judgment

of the United States Court of Appeals for the Tenth Circuit which reversed an order of the District Court for the Western District of Oklahoma which concluded that the federal court had jurisdiction over Petitioner's claims and denied Respondents' motion to dismiss.

A. Summary of Facts and Anatomy of Litigation

Your petitioner for writ of certiorari is presently a justice of the Oklahoma Supreme Court, where he has been serving since 1978. He is 85 years old and, pursuant to the court's pre-2004 rotation regime for selection of chief justices, was chief justice for a two-year period in 1991 and 1992. Priority in the rotation line is accorded by the order of seniority in service. He again entered the rotation system's top place for succession when he had been elected, in November 2002, to serve as vice-chief justice for 2003 and 2004. Appendix 15a-16a.

Before November 2004, Rule 4 of the Internal Operating Procedures of the Supreme Court provided that the term of office of chief justice be rotated among eligible members of the court and that no justice shall succeed himself (or herself) as chief justice nor be eligible to serve as chief justice until he or she completed six years of service as a justice of the court. Under this internal rule, the vice-chief justice would historically succeed the chief justice. Justice Opala held a top eligibility spot to be elected to the office of chief justice in November 2004. Appendix 15a-16a.

Immediately before the November 2004 election, Rule 4 was amended. Its principal change allowed a justice to succeed himself (or herself) as chief justice, effectively giving the-then chief justice top eligibility to remain in

office, instead of allowing the vice-chief justice to advance. As a result of that rule change, Justice Opala was relegated to a low eligibility status that, for practical purposes, rendered it impossible for him to be eligible once again for selection as chief justice. Appendix 16a-17a. Chief Justice Watt was elected for a second consecutive term as chief justice and Justice Winchester was elected vice-chief justice.

While still vice-chief justice[1] Justice Opala sued his eight colleagues (the respondents) on December 29, 2004, in the U.S. District Court for the Western District of Oklahoma, to secure a declaration that Rule 4 of the Oklahoma Supreme Court, as amended on November 4, 2004, is violative of the Constitution of the United States. Rule 4 governs the rotation line for selection of chief justice of Oklahoma's highest court. **Its 2004 amendment removed Justice Opala from his high place in the rotation line.**

In short, before the November 4, 2004 amendment of Rule 4 the petitioner occupied the position of vice-chief justice to which he rose by election almost two years earlier through the then-effective rotation-by-seniority regime. By a long-followed practice the vice-chief justice currently in office is entitled to stand, ahead of his other

[1] Justice Opala's two-year term as vice-chief justice **did not end until January 1, 2005**. Acting under the New Rule 4 rotation regime, the court on November 4, 2004 re-elected Chief Justice Watt as **chief justice** and elected Justice Winchester as **vice-chief justice**, both to serve concurrently **for a two-year term that commenced January 1, 2005**. An extended two-year term for a chief justice was an **unprecedented departure** from the court's nearly century-old tradition of **affording equal treatment** to all of its members who stand in rotation line for an opportunity to become chief justice.

colleagues, for election to be the next chief justice. The change of Rule 4's text **dislodged the petitioner**, then vice-chief justice in office, from his preferential position as an investitive-track justice in the rotation line for consideration to succeed the then chief justice in office. In short, **the eleventh-hour Rule 4 change served to remove the insuperable internal obstacle to the election of someone other than Justice Opala as chief justice**.

Justice Opala's divestiture, of which he now complains in this lawsuit, was accomplished by means of the described rule change. **That change offends both due process and equal protection**. *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 575, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). No state-law interest that stands in investitive-track stage may be destroyed by means inconsistent with due process. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957).

B. Course of Proceedings Below

On disqualification of the Western District's judges, Chief Judge Tacha (of the U.S. Court of Appeals for the Tenth Circuit) assigned to the case a senior judge from Wyoming, the Hon. Clarence Brimmer. Judge Brimmer **denied** on May 20, 2005 the defendants' quest for dismissal of the suit as barred by legislative, sovereign (Eleventh Amendment), and qualified immunity and by failure to present a substantial federal question. Appendix 28a-29a, 36a, 38a, 42a, and 45a. On July 14, 2005 Judge

Brimmer also **denied** the defendants' post-decisional motion for reconsideration. **No facts in this controversy had ever been tendered for adjudication nor been judicially tested and settled.** The defendants took an interlocutory appeal from Judge Brimmer's refusal to dismiss the claim. By its July 21, 2006 pronouncement, a three-judge panel of the U.S. Court of Appeals for the Tenth Circuit reversed Judge Brimmer's denial of the cause's dismissal and directed the complaint to be dismissed with prejudice for want of jurisdiction. Appendix 13a. The appellate dismissal rests on the panel's view that Justice Opala's claimed injury is "not redressable . . . [by] prospective relief." Appendix 13a. The issue dispositive of the appeal was raised by the court ***sua sponte***. By simultaneous briefs the parties were invited to respond to the court's mid-appeal concern for redressability.[2]

The petitioner submits that the **panel's conclusion** on a federal court's inability to redress the claim by giving the plaintiff prospective relief, which is dispositive of the panel's pronouncement, **rests on an erroneous assumption of facts**[3] and **is fraught with a patent legal flaw.**

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[2] The (panel-raised) redressability issue's outer contours remained amorphous until the panel's opinion became public. The conclusion of the panel could not be anticipated by its invitation, couched in broad terms, to brief redressability. Prospective non-redressability was not an issue (in the adversarial sense of the term) until the opinion's promulgation.

[3] The panel erroneously concludes in its opinion that Justice Opala was **no longer vice-chief justice** when the **December 29, 2004** suit was filed. Its opinion states in pertinent part:

> **Before Justice Opala filed this suit**, Chief Justice Watt was re-elected to his post, and **Justice Opala was succeeded as Vice-Chief Justice** by Justice Winchester.

Appendix 6a.

(Continued on following page)

By his certiorari quest Opala seeks this Court's pronouncement that his claim may be fully redressed prospectively and for its order that will return the case for further proceedings to be held before t' e assigned Judge Brimmer in the Western District of Oklahoma.

ARGUMENT

I. THIS CASE PRESENTS A FIRST-IMPRESSION ISSUE ON PROSPECTIVE REDRESSABILITY OF A JUDGE'S CLAIM

This case deserves this Court's attention. It presents a first-impression issue on prospective redressability of both **individual** (personal) as well as **institutional interests** tendered for vindication by a judge involved in an intra-court dispute over the constitutional legitimacy of a rule-governed rotation regime for succession to the position of the court's chief administrator. Justice Opala's injury by loss of an opportunity to become chief justice – under the regime effective at the time of his ascension to the office of vice-chief justice – is of course personal to him. But his other harm is institutional. It

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* * *

> **Because Justice Opala was no longer the Vice-Chief Justice of the Oklahoma Supreme Court when he filed suit**, and because the equitable powers of the federal courts are limited to providing prospective equitable relief, we ordered supplemental briefing on whether this court was capable of issuing a remedy that redresses Justice Opala's alleged injury. (emphasis added).

See Appendix 9a.

See also text of footnote 1, *supra*.

consists of having to accept and serve under a court leadership he deems to have been imposed **on him and on the court he serves** by adoption of an unconstitutional rule change to govern the rotation regime.

This Court has previously dealt with legislator-brought intramural disputes, **but never before** with similar intra-court disagreements over rules that govern the order of succession to a chief administrator – the justice who holds a position having great impact on the integrity and quality of adjudicative decision-making process.[4] *Raines v. Byrd*, 521 U.S. 811, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997); *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969); *Coleman v. Miller*, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939).

Powell provides an illustrative comparison for this case. Powell, the elected congressman from New York, brought a declaratory judgment claiming that the House of Representatives unconstitutionally excluded him from taking office by passing a resolution prohibiting him from taking his seat on grounds unrelated to the qualifying requirements set forth in Art. I, § 2, of the Constitution. The District Court dismissed Powell's complaint for lack of subject matter jurisdiction, but this Court took little time to reject that argument, holding that a request for declaratory judgment is a form of relief the District Court

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[4] David J. Weiner, *The New Law Of Legislative Standing*, 54 Stan. L. Rev. 205 (2001); Joan Elizabeth Clarke, Melissa Curtin, Christopher Gawley, Note, *Recent Decisions Of The United States Court of Appeals For The District Of Columbia Circuit: Constitutional Law*, 69 Geo. Wash. L. Rev. 554, 580-87 (2001); Tracy Rottner Yu, Note, *"Standing" In A Quagmire: Raines v. Byrd, 117 S.Ct. 2312 (1997)*, 67 U. Cin. L. Rev. 639, 659 (1999).

could have afforded, and that relief may be considered independently of other forms of relief that may be available. *Powell*, 395 U.S. at 518, citing *United Public Workers v. Mitchell*, 330 U.S. 75, 93, 67 S. Ct. 556, 91 L. Ed. 754 (1947); 6A J. Moore, Federal Practice ¶ 57.08 [3] (2d ed. 1966); cf. *United States v. California*, 332 U.S. 19, 25-26, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947). This Court also concluded that Powell's request for redress for his unconstitutional exclusion from the office of a congressman, to which he was duly elected, was justiciable. *Id.*

The fact that the time period of the 90th Congress, from which Powell had been excluded, had already extended beyond its deliberative period in session, and the 91st Congress was about to convene – with Powell in attendance – did not affect this Court's ability to fashion for Powell an appropriate relief. This Court acceded to Powell's request for a declaratory judgment and held that the U.S. House of Representatives unconstitutionally excluded Powell from taking his seat in the 90th Congress because he met the qualifications for taking office set forth in the Constitution and because the House had no discretionary authority to deny membership to any person duly elected by the constituents. *Powell*, 395 U.S. at 550.

This Court's decision in *Powell* is important in this case. First, if Powell's claim was redressable by judicial process, Opala's should be as well. Second, although in *Powell* this Court made its initial foray into intramural rule-making decisions for persons in legislative service, it has yet to pronounce the same protection for those in the judicial branch. This case is hence clearly one of first impression and deserves this Court's attention.

In short, *Powell* settles the law which makes **due process govern that internal decision-making process** of the U.S. House of Representatives which affects the status of its members. The same principle must be dealt with here. Justice Opala's status, in investitive track when the critical adverse decision was made, could not be altered by an internal midstream rule change. That alteration violated due process. This is so because the Oklahoma Supreme Court may not affect the status of its members without according them the protections of due process.

Opala's standing in this case is governed by a three-prong test. A plaintiff must meet three criteria to achieve standing: (1) he (or she) must have sustained particular and concrete injury-in-fact, (2) caused by the defendant, (3) which is redressable through the judicial process.[5] *Raines,* 521 U.S. at 818; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-72, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1992); *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979). The redressability prong is satisfied if there is a likelihood that the injury will be redressed by a favorable decision – meaning that the prospect of obtaining relief from a favorable decision is not too speculative. *Board of County Commissioners v. Geringer*, 297 F.3d 1108 (10th Cir. 2002). Plaintiffs need neither show that the entire problem will be

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[5] Tracy Rottner Yu, *"Standing" In A Quagmire: Raines v. Byrd, 117 S.Ct. 2312 (1997), supra* note 4 at 659.

cured if the plaintiff prevails in the action nor that the challenged action is the exclusive source of the harm. They stand equally relieved from having to speculate about developments to arise **after** the redress sought by them has been obtained.

The panel's *sua sponte* challenge to Opala's standing targeted solely the third element, that of the injury's redressability. Appendix 9a. We discuss (under subparagraph II) the flaws in the panel's analysis of that prong. Justice Opala's success or failure to recapture the vice-chief justice position or to attain chief justiceship is not at all germane to the redressability *vel non* of the grievance pressed in his present forensic battle. **What he seeks here is a federal court's condemnation of New Rule 4.** This will restore constitutional legitimacy to the internal succession rules of the court he serves. **That restoration is the crux of his personal and institutional interests to be vindicated in this lawsuit.**

II. THE PANEL'S DECLARATION THAT OPALA'S CLAIM IS NOT PROSPECTIVELY REDRESSABLE IS SUPPORTED NEITHER BY THIS COURT'S EXTANT JURISPRUDENCE NOR BY LEGAL LOGIC. THE PANEL'S OPINION IS FLAWED BECAUSE IT MISCHARACTERIZES PETITIONER'S CLAIM BY IMPUTING TO HIM A NEED FOR RELIEF HE NEITHER SEEKS NOR DESIRES

The panel's order of dismissal seems to rely on two grounds, both set forth in the Court of Appeals' opinion. **The first** of these is that "[b]ecause we are only permitted to grant prospective equitable relief under *Ex parte Young* [209 U.S. 123 (1908)], **we cannot undo this election**"

and **the second** is that "a declaration that New [amended] Rule 4 is unconstitutional will not remedy Justice Opala's claimed injury that he was not able to stand for election under Old Rule 4 while serving as Vice Chief Justice." Appendix 6a.

The panel's decision rests solely on its conclusion that Justice Opala's claim is not redressable by prospective relief from a federal court. This petition for certiorari seeks this Court's review of that pronouncement. Petitioner asserts the panel's conclusion is contrary to applicable law because it **mischaracterizes his claim as a common-law (state-court) action** of *quo warranto* to try his title to the office of vice-chief justice or as a proceeding for a writ of mandamus to command the eight justices who are respondents here to once again recognize him as vice-chief justice. No such relief lies within the contemplation of this simple (federal-court) action for a judicial declaration that the rule change of November 4, 2004 is constitutionally infirm. Speculation about possible post-relief occurrences dehors the federal court, which may follow the nullity sentence, should not be engaged in when making assessments about the likelihood of a grievance's redressability.

A. Prospective Redressability of Petitioner's Grievance

Sought for judicial correction here is more than just Justice Opala's **individual (personal) interest** in protecting his place in the legitimate rotation by making the Oklahoma court adhere to in-service-seniority order in place when he became vice-chief justice. At stake is also his **institutional interest in preventing the court's**

continued operation by passing the top administrative post to illegitimate holders selected under an unconstitutional Rule 4. Both of these interests will be fully vindicated by a federal court's sentence of nullity for the New Rule 4.

Whether anointment or condemnation of Rule 4 will be the ultimate outcome of this lawsuit, **redressability of Justice Opala's grievance is readily achievable simply and solely by the federal court's *in praesenti et in futuro* (in the present and for the future, or by contemporaneous and prospective) declaration of the New Rule 4's constitutional infirmity**. The sole objective he seeks to attain is that, after a declaration of nullity, no future vice-chief or chief justice will be elected under the constitutionally offensive rotation order. **Nothing else is needed for full redressability.**

B. Prospective Condemnation of New Rule 4

The panel also erred when concluding that Justice Opala's claim cannot be redressed by prospective relief. All that is sought is an *in praesenti et in futuro* invalidation of the rule change. No other relief is contemplated, as the trial judge's order clearly held. The panel **mischaracterized** the claim and substituted its own idea of the relief genre needed for achieving that which stands tendered by the complaint and by the position of respondents herein before both the trial judge and the panel.

Justice Opala seeks only a prospective condemnation of New Rule 4. His complaint asks for nothing else. The panel was clearly mistaken in attributing more to his quest for relief. Nothing in his complaint or briefs warrants the panel's assumption, inherent in its analysis,

that he wishes to be declared either vice-chief justice or chief justice of the court he serves.[6] Opala sought neither retrospective nor *pendente lite* relief, but waited patiently for relief to come and become effective contemporaneously with the claim's adjudication. In short, no relief is expected, and no contrary conclusion is warranted on this record other than a prospective sentence of nullity for New Rule 4.[7] No monetary relief whatever is pressed for in this suit. Relief is prospective if it enforces a current and

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[6] The panel accepted petitioner's statement (in his appellate brief) that he lost an investitive-track opportunity as his quest to be declared vice-chief justice. Appendix 11a-12a. Opala's statement was made solely for the purpose of stressing his federal-court standing – that in the process of effecting a rule change he was deprived of an important federally protected interest. The statement does not constitute a part of his demand for relief. Petitioner's post-relief status change, if any, is not an issue here.

[7] *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). "No fewer than ten times, the Court described the type of relief permitted by Ex parte Young as relief seeking to halt an 'ongoing' or 'continuing' or 'current' or 'present' violation of federal law. Perhaps more important, the Court stated that it had 'refused to extend the reasoning of Young . . . to claims for retrospective relief.'" Carlos Manuel Vazquez, *Night And Day: Coeur d'Alene, Breard, And The Unraveling Of The Prospective-Retrospective Distinction In Eleventh Amendment Doctrine*, 87 Geo. L.J. 1, 34 (1998) (footnotes omitted). Judge Brimmer notes that "'Declaratory judgments are construed as retroactive relief only when "[t]here is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction." Declaratory relief is prospective, when sought to prevent a state's current violation of the law.'" Appendix 25a, quoting *Powder River Basin, Resource Council v. Babbit*, 54 F.3d 1477, 1483 (10th Cir. 1995) (quoting *Green v. Mansour*, 474 U.S. 64, 73, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985)). "[I]n the present case, Plaintiff asserts that Rule 4, as amended, violates federal law. This amended version is still in effect, and thus, Plaintiff asserts a continuing violation of federal law. . . . [O]nce Defendants amended Rule 4, if unconstitutional, any action pursuant to this Rule places them squarely within the *Ex parte Young* exception." Appendix, 26a, 27a.

future duty. Relief is retrospective if it remedies the past breach of a duty.[8] *Edelman v. Jordan*, 415 U.S. 651, 668, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). **We ask only for relief to be effective in the present and for the future**, so that the Supreme Court of Oklahoma will no longer be able to hold any elections either for vice-chief or chief justice under the terms of the infirm rule.

III. SUMMARY

The law and its logic have both been dealt grave violence by the panel's declaration that makes petitioner's constitutional grievance not redressable prospectively. The panel's mischaracterization of Opala's claim as not redressable perpetuates a state of continued illegitimacy in the internal management's rotation at the highest court of Oklahoma and leaves his fundamental-law injury completely irremediable. This Court is afforded a unique opportunity to correct the panel's error. Although it is perhaps distasteful for any court to preside over legal disagreements among judges, state or federal, this is neither a petty nor a purely personal intra-court squabble to be ignored. An injury to a person's constitutionally protected interest was done. It deserves the very same prospective correction in favor of a judge that would and should be made in favor of a legislator, of a professor at a state institution, or in favor of some

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[8] Carlos Manuel Vazquez, *Night And Day: Coeur d'Alene, Breard, And The Unraveling Of The Prospective-Retrospective Distinction In Eleventh Amendment Doctrine*, *supra* note 8; William Burnham, *Federal Court Remedies For Past Misconduct By State Officials: Notice Relief And The Legacy Of Quern v. Jordan*, Am. U. L. Rev. 53, 66, 85, 105 (1984).

other state official. Judges deserve no less constitutional protection from government lawlessness than legislators, executive service's officials or public university teachers.

For the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARIAN P. OPALA,

Plaintiff-Appellee,

v.

JOSEPH M. WATT; JAMES R. WINCHESTER; ROBERT E. LAVENDER; RUDOLPH HARGRAVE; YVONNE KAUGER; JAMES E. EDMONDSON, STEVEN W. TAYLOR; AND TOM COLBERT, in their individual and administrative capacities,

Defendants-Appellants.

No. 05-6261

Filed Jul. 21, 2006

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-04-1771-R)

W.A. Drew Edmondson, Attorney General (Neal Leader, Senior Assistant Attorney General on the briefs), Office of the Attorney General State of Oklahoma, Oklahoma City, Oklahoma, for the Defendants-Appellants.

Scott F. Brockman (Stanley M. Ward and Woodrow K. Glass, with him on the briefs), Ward & Glass, LLP, Norman, Oklahoma, for the Plaintiff-Appellee.

Before **LUCERO**, **EBEL**, and **O'BRIEN**, Circuit Judges.

LUCERO, Circuit Judge.

Article 7 section 2 of the Oklahoma Constitution provides that the Justices of the Oklahoma Supreme Court shall choose a Chief Justice and Vice-Chief Justice from among their members. Having failed in his desire to be chosen once again Chief Justice of the Oklahoma Supreme Court, Justice Marian P. Opala seeks to invoke the jurisdiction of the federal courts in his effort to achieve that end. He brings to us claims that he was discriminated against on the basis of his age in violation of the Equal Protection Clause and that his due process rights were violated when his colleagues on the Oklahoma Supreme Court changed the rule of rotation for elevation of a Chief Justice from one which precluded re-election to that position for more than one consecutive term to one which lifted that prohibition and re-elected Joseph P. Watt as Chief Justice.

After Justice Opala named his judicial colleagues as defendants in federal proceedings, they responded by asserting several defenses, including sovereign immunity, qualified immunity, and legislative immunity. The district court disagreed with the defendants, concluded that federal jurisdiction was properly invoked, and denied the motion to dismiss. Defendants bring an interlocutory appeal. We take a quite different view of the jurisdictional issue, and for the reasons that follow, we **REVERSE** the

judgment of the district court and **REMAND** with instructions to **DISMISS** the complaint with prejudice.

I

Implementation of the Oklahoma constitutional provision for choosing a Chief Justice and a Vice-Chief Justice is set forth in Rule 4 of the Internal Operating Procedures of the Oklahoma Supreme Court Conference. Prior to November 4, 2004, Rule 4 provided:

> The term of office of Chief Justice shall rotate among eligible members of the Court every two years. A Justice is eligible to become Chief Justice when each sitting Justice at the time of the Justice's appointment has completed a term as Chief Justice or waived his or her right to do so. No Justice shall succeed himself or herself as Chief Justice, nor shall a Justice be eligible hereunder until he or she has completed six years service as Justice of this Court.

("Old Rule 4"). In his complaint, Justice Opala claims that this rule, and his status as Vice-Chief Justice at the time, created a "reasonable expectation" that he would be nominated for Chief Justice.

On November 4, 2004, all members of the Oklahoma Supreme Court, save Justice Opala, convened a conference to vote on a proposed change to Rule 4. Justice Opala was aware of the meeting, but chose not to attend in protest. The defendants voted to amend the rule, which now reads:

> The term of office of Chief Justice shall rotate among eligible members of the Court every two years. The next senior Justice who has never served as Chief Justice should be considered for

> election as Chief Justice, provided that the Justice has served at least four (4) years on this Court including service as Vice-Chief Justice. If the next senior Justice has not served at least four (4) years on the Court including service as Vice-Chief Justice, the incumbent Chief Justice or any other Justice who has served as Chief Justice may be elected to another two-year term as Chief Justice. Otherwise, the Chief Justice will serve only one term.

("New Rule 4"). According to Justice Opala, the practical effects of this amendment were to cause defendant-Chief Justice Joseph Watt to have top priority for being re-elected to the position of Chief Justice, and to prohibit Justice Opala himself from being elected as Chief Justice. Specifically, Justice Opala asserted that because of "[his] tenure as a Justice of the Court, [he] was the only Justice eligible to be nominated for the Office of Chief Justice because each of the other Justices that had satisfied the qualification of completing six (6) years of service as Justice [Opala] had completed a term of Chief Justice." The defendant-Justices duly voted pursuant to New Rule 4, and re-elected Chief Justice Watt. Justice James Winchester was elected to Vice-Chief Justice.

On December 29, 2004, Justice Opala filed suit in federal district court against the other members of the Oklahoma Supreme Court challenging the constitutionality of New Rule 4. He argued that the amendment to Old Rule 4 violated his rights to equal protection of the laws pursuant to the Fifth and Fourteenth Amendments because it was motivated in part by his age (Justice Opala was eighty-three at the time of filing). He also asserted that he was deprived of a liberty interest in the Chief Justiceship in violation of the procedural component of the

Due Process Clause because the amendment did not provide for any post-deprivation hearing. The only redress he sought was a declaration that New Rule 4 violated the Constitution.

As noted, defendants moved to dismiss invoking legislative immunity, sovereign immunity under the Eleventh Amendment, qualified immunity, and failure to present a substantial federal question. The district court denied the motion, finding that: (1) legislative immunity did not apply because the amendment was an administrative and not a legislative act; (2) the suit fell within the *Ex Parte Young,* 209 U.S. 123 (1908), exception to Eleventh Amendment sovereign immunity because Justice Opala was seeking prospective – not retroactive – equitable relief; (3) qualified immunity did not apply because Justice Opala was not seeking money damages; and (4) determining whether Justice Opala asserted a "substantial federal question" was infeasible without discovery. Defendants' subsequent motion for reconsideration of the denial of their motion to dismiss was denied by the district court. It was then that the defendants sought this interlocutory appeal.

II

We review de novo the district court's denial of a motion to dismiss for lack of subject matter jurisdiction. *Brumark Corp. v. Samson Resources Corp.,* 57 F.3d 941, 944 (10th Cir. 1995). We have jurisdiction to review the district court's denial of defendants' motion to dismiss for lack of subject matter jurisdiction under the collateral order exception to 28 U.S.C. § 1291, which provides for interlocutory appeal of orders denying motions to dismiss

brought on the basis of Eleventh Amendment immunity as the basis for appellate jurisdiction.

Before Justice Opala filed this suit, Chief Justice Watt was re-elected to his post, and Justice Opala was succeeded as Vice-Chief Justice by Justice Winchester. Because we are only permitted to grant prospective equitable relief under *Ex Parte Young,* we cannot undo this election. Moreover, a declaration that New Rule 4 is unconstitutional will not remedy Justice Opala's claimed injury that he was not able to stand for election under Old Rule 4 while serving as Vice-Chief Justice. Accordingly, we reverse the district court's denial of defendants' motions to dismiss, and remand with instructions that the district court dismiss the complaint for want of jurisdiction.

As courts of limited subject matter jurisdiction, the federal courts may only rule upon "Cases" and "Controversies." U.S. Const. art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 499 (1975).

The "irreducible constitutional minimum" of Article III's case-or-controversy requirement contains three elements. *Lujan,* 504 U.S. at 560; *Committee to Save the Rio Hondo v. Lucero,* 102 F.3d 445, 447 (10th Cir. 1996). First, the plaintiff must have suffered an "injury in fact" that is "concrete" rather than "conjectural or hypothetical." *Lujan,* 504 U.S. at 560. Second, the plaintiff must show that there is a "causal connection between the injury and the conduct complained of." *Id.* Finally, the plaintiff must

show that it is "likely," and not merely "speculative," that the injury complained of will be "redressed by a favorable decision." *Id.*, 504 U.S. at 561. The party seeking to invoke federal jurisdiction bears the burden of establishing all three elements of standing. *Id.*

Because this suit is against the members of the Oklahoma Supreme Court in their official capacities, federal jurisdiction is limited by sovereign immunity. "[N]onconsenting States may not be sued by private individuals in federal court." *Bd. of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 363, (2001); *see also Alden v. Maine,* 527 U.S. 706, 713 (1999) ("[A]s the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution and which they retain today. . . .").

A state's immunity from suit by private individuals in federal court is not absolute. It may be overcome in three instances: (1) the state consents to suit; (2) Congress expressly abrogates the states' immunity; or (3) the citizen sues a state official pursuant to *Ex Parte Young,* 209 U.S. 123 (1908). *See J.B. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1286 (10th Cir. 1999). This third exception to Eleventh Amendment immunity is now before us.

In determining whether a suit falls within the *Ex Parte Young* exception, this court applies a four-part test:

> First, we determine whether the action is against state officials or the state itself. Second, we look at whether the alleged conduct of the state officials constitutes a violation of federal law. Third,

> we assess whether the relief sought is permissible prospective relief or analogous to a retroactive award of damages impacting the state treasury. Finally, we analyze whether the suit rises to the level of implicating 'special sovereignty interests.'

Robinson v. Kansas, 295 F.3d 1183, 1191 (10th Cir. 2002) (internal citations and quotations omitted).

The district court found that Justice Opala's suit satisfied all four criteria for the *Ex Parte Young* exception. In order to review this determination, it is necessary that we consider Justice Opala's complaint in detail. Justice Opala sought a declaratory judgment declaring that the amendment of Rule 4:

> (1) constitutes a violation of Plaintiff's right to equal protection pursuant to the Fifth and Fourteenth Amendments to the United States Constitution; (2) constitutes a substantial deprivation of Plaintiff's property without due process of law in violation of the Fourteenth Amendment of the United States Constitution; (3) violated due process of law under the Fourteenth Amendment of the United States Constitution because it does not provide for any adequate and immediate post-deprivation hearing on Plaintiff's preclusion from eligibility to be nominated for the position of Chief Justice; and (4) constitutes a substantial deprivation of Plaintiff's liberty interest without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

The district court observed that Justice Opala is not requesting retroactive money damages from the state; rather, the relief he is requesting is to "end an ongoing violation of Plaintiff's constitutional rights" by reinstating

Old Rule 4. *Opala v. Watt,* 393 F.Supp.2d 1154, 1160 (W.D. Okla. 2005). The court correctly concluded that the mere fact that Opala was seeking to "right a previous wrong" did not disqualify the action from the *Ex Parte Young* exception.

However, the district court's analysis of its jurisdiction in this matter was incomplete: Not only must the requested relief be prospective in nature (to satisfy *Ex Parte Young*), a ruling from this court must be capable of redressing the alleged injury for Justice Opala to have standing to file his suit. Because Justice Opala was no longer the Vice-Chief Justice of the Oklahoma Supreme Court when he filed suit, and because the equitable powers of the federal courts are limited to providing *prospective* equitable relief, we ordered supplemental briefing on whether this court was capable of issuing a remedy that redresses Justice Opala's alleged injury. In their supplemental brief, appellants argue that even were we to declare that New Rule 4 is unconstitutional, Justice Opala would nevertheless have to stand for election, and his election to Chief Justice would not be more likely. Thus, they tell us, any relief we may afford would only speculatively redress Justice Opala's alleged injury. Justice Opala disagrees, and insists that if we reinstated Old Rule 4, such action would undoubtedly redress his injuries. He argues that "[a] ruling in Justice Opala's favor would declare the amended Rule 4 invalid as violative of Justice Opala's Constitutional rights, and would place Justice Opala in the Constitutionally-protected position he was in prior to the rule's amendment." This statement, however, mischaracterizes Justice Opala's injury. According to his own brief, his injury is that "the amendment to Rule 4 removed him from his investitive track to be Chief

Justice without rational basis and did not permit him to come up for selection as Chief Justice in the same manner that all other Vice-Chief Justices had for the past sixty plus (60+) years." Because declaring New Rule 4 to be unconstitutional would not redress this injury, we must vacate the judgment below and dismiss the suit.

In *Glover River Org. v. United States Dept. of Interior,* 675 F.2d 251 (10th Cir. 1982), we considered a challenge to the Secretary of Interior's listing of the leopard darter on an endangered species list. Plaintiffs claimed that they were injured because the listing precluded them from promoting a flood control project on a river in Oklahoma. *Id.* at 254. They sought an injunction requiring the Secretary of the Interior to prepare an environmental impact statement together with an order staying the listing until the statement was completed. *Id.* We held plaintiffs lacked standing because a remedy from the federal courts would not redress their alleged injuries. *Id.* at 255. Specifically, we concluded that even if preparation of an environmental impact statement led to the removal of the leopard darter from the endangered species list, "this would not ensure the funding or construction of the project." *Id.*

More recently in *Wyoming Sawmills, Inc. v. United States Forest Service,* 383 F.3d 1241 (10th Cir. 2004), a timber company claimed that it was denied the right to buy timber because of an Historical Preservation Plan issued by the United States Forest Service for the management of Medicine Wheel National Historic Landmark. The company claimed that the refusal to hold the timber sale violated the Establishment Clause and the national Forest Management Act. *Id.* at 1244-45. The district court found that the plaintiff timber company lacked standing to challenge the Plan "because the court could not remedy

the constitutional wrongs plaintiff had alleged." *Id.* at 1246. Even if the Historic Preservation Plan were declared unconstitutional, the district court concluded, the Forest Service would nevertheless not be under any obligation to sell timber from the area. Affirming the dismissal for lack of standing for want of pleading a redressable injury, we held:

> Wyoming Sawmills has not shown that a timber lease would "likely" become available on the lands within the area of consultation if plaintiff were to have the HPP set aside. As in *Baca* [*Baca v. King,* 92 F.3d 1031 (10th Cir. 1996)], the federal agency has complete discretion as to whether to offer the opportunity sought by the plaintiff, and accordingly the courts do not have the power to grant the only relief that would rectify the alleged injury.

Id. at 1249.

Applying these authorities to the present litigation yields a clear result: Any remedy the federal courts could fashion would not redress Justice Opala's injury. According to his complaint, Justice Opala was injured because he had to face election under New Rule 4 rather than under Old Rule 4. Because he was Vice-Chief Justice at the time, the use of Old Rule 4 would have made his election as Chief Justice likely. As stated in his brief:

> [A] ruling in his favor, which would reinstate the pre-determined sequential order to that which existed prior to the Rule 4 amendment, would redress in full Justice Opala's grievance. It will place him back in the investitive track for Chief Justice, cure the Constitutional defects incurred by Appellee's Rule 4 amendment, and allow Justice Opala to stand for selection as

> Chief Justice where he must be the first 'candidate' considered.

However, we lack the power to "reinstate the predetermined sequential order to that which existed prior to the Rule 4 amendment." We simply cannot make Justice Opala Vice-Chief Justice again. This is precisely the type of retroactive equitable relief prohibited under the *Ex Parte Young* doctrine. The relief sought in the complaint – a declaration that New Rule 4 is unconstitutional – would not place Justice Opala in the position he was in on November 3, 2004. There is no prospective remedy that can unring that bell.[1] Justice Opala's claimed injury is simply not redressable with prospective relief.[2] Thus, the federal courts lack the power to resolve this dispute.

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[1] At oral argument, counsel for Justice Opala, responding to a line of questioning about redressability, suggested that the proper remedy was a "post-election, post-deprivation name clearing" hearing. We cannot understand how such a hearing would redress Justice Opala's claimed injury.

[2] Justice Opala cites *Regents for the Univ. of California v. Bakke*, 438 U.S. 265 (1978) for the proposition that a plaintiff need not prove he will prevail in a contest (such as the election for Chief Justice) in order to constitutionally challenge the rules of that contest. In *Bakke*, the Supreme Court held that a medical school applicant had standing to challenge the school's quota for minority students although he could not prove that absent the quota he would have been admitted. Bakke's injury did not consist in being rejected from medical school per se. Rather, he allegedly was injured by being forced to unconstitutionally compete for a smaller number of slots. This is not the case before us. The only remedy that we may provide is to declare New Rule 4 unconstitutional. This would not redress Justice Opala's claimed injury because it would not restore his place in the "investitive track."

III

Because no prospective equitable relief can redress Justice Opala's alleged injury, we **REVERSE** the judgment of the district court and **REMAND** with instructions that the district court **DISMISS** the complaint for want of jurisdiction with prejudice. Justice Opala's "application to file statement regarding disputed facts" is **DENIED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARIAN P. OPALA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
JOSEPH M. WATT; JAMES R. WINCHESTER; ROBERT E. LAVENDER; RUDOLPH HARGRAVE; YVONNE KAUGER; JAMES E. EDMONDSON; STEVEN W. TAYLOR; and, TOM COLBERT, in their individual and administrative capacities,	)	**CIV-04-1771-R**
	)	
Defendants.	)	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

(Filed May 20, 2005)

This matter is before the Court on Defendants' Motion to Dismiss. Upon reading the briefs, hearing oral argument, and being fully advised in the premises, the Court **FINDS** and **ORDERS** as follows:

Statement of the Parties and Jurisdiction

Plaintiff is and has been a resident of Warr Acres, Oklahoma, at all relevant times. Plaintiff is a member and justice of the Oklahoma Supreme Court.

Defendants Watt, Winchester, and Kauger are residents of the Western District of the United States District Court for the State of Oklahoma. Defendants Watt,

Winchester, Lavender, Hargrave, Kauger, Edmondson, Taylor, and Colbert were and are currently members and justices of the Oklahoma Supreme Court whose principal place of conducting business is Oklahoma City, Oklahoma.

This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201. Plaintiff claims violations of his due process and equal protection rights under the Fourteenth Amendment of the United States Constitution. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201 and 2202. Venue is proper pursuant to 28 U.S.C. § 1391(b).

Background

Plaintiff Marian Opala is a member and Justice of the Oklahoma Supreme Court. All Defendants are also members and Justices of the Oklahoma Supreme Court. Plaintiff is presently the Vice-Chief Justice of the Supreme Court. Defendant Watt is presently the Chief Justice.

The Oklahoma Constitution, Article 7, § 2 provides that the Justices shall elect a Chief Justice and a Vice-Chief Justice. The Justices had adopted rules and procedures governing the process for selecting the Chief Justice. The rules are titled "Internal Operating Procedures of the Supreme Court Conference" ("Rules"). Prior to November 4, 2004, the Rules provided:

> The term of office of Chief Justice shall rotate among eligible members of the Court every two years. A Justice is eligible to become Chief Justice when each sitting Justice at the time of the Justice's appointment has completed a term as Chief Justice or waived his or her right to do so. No Justice shall succeed himself or herself as

> Chief Justice, nor shall a Justice be eligible hereunder until he or she has completed six years service as Justice of this Court.

Plaintiff asserts that he was the only Justice eligible to be nominated for the Chief Justice position under the above system. Plaintiff states that, despite the language of the rule, traditionally, upon the expiration of the Chief Justice's term, the Vice-Chief Justice succeeded to the office of Chief Justice without an election.[1] Plaintiff further alleges that Justice Winchester had informed him that he would become Chief Justice unless the Rules changed. Thus, Plaintiff asserts that he had a legitimate expectation of becoming the next Chief Justice.

However, prior to electing a new Chief Justice, the Justices are alleged to have enacted a change to the Rules which allowed a Chief Justice to succeed himself. The Rule as amended states:

> The term of office of Chief Justice shall rotate among eligible members of the Court every two years. The next senior Justice who has never served as Chief Justice should be considered for election as Chief Justice, provided that the Justice has served at least four (4) years on this Court including service as Vice-Chief Justice. If

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[1] Plaintiff alleges additional facts which were not contained in the Complaint. These facts may be considered by this Court, as the facts are consistent with the allegations and theories contained in the Complaint. "While it might be appropriate for a court to consider additional facts or legal theories asserted in a response brief to a motion to dismiss if they were consistent with the facts and theories advanced in the complaint, *cf. Sterling v. Kazmierczak*, 983 F.Supp. 1186, 1189 (N.D. Ill. 1997), a court may not consider allegations or theories that are inconsistent with those pleaded in the complaint." *Hayes v. Whitman*, 264 F.3d 1017, 1025 (10th Cir. 2001).

> the next senior Justice has not served at least four (4) years on the Court including service as Vice-Chief Justice, the incumbent Chief Justice or any other Justice who has served as Chief Justice may be elected to another two-year term as Chief Justice. Otherwise, the Chief Justice will serve only one term.

Plaintiff states that he was not privy to the discussions which led to this change. According to Plaintiff, the practical effect of this change was to cause Defendant Watt to have the top priority for the position of Chief Justice, while ensuring that it was nearly impossible for Plaintiff to be elected to this position. Plaintiff asserts that the motivation behind this Rule was to prohibit Plaintiff from being elected as Chief Justice. Plaintiff believes that his age, eighty-three, was a significant factor in the amendment of Rule 4.

Plaintiff alleges that his right to equal protection under the Fifth and Fourteenth Amendments to the United States Constitution has been violated. Plaintiff asserts that he has been deprived of a significant property interest without Due Process of law in violation of the Fourteenth Amendment of the United States Constitution because there has not been a hearing or judicial review of Defendants' actions. Thus, Plaintiff is seeking declaratory judgment pursuant to 28 U.S.C. § 2201. Plaintiff requests that this Court enter a declaratory judgment stating that the amendment constitutes a violation of equal protection and due process and declaring the amendment null and void.

Standard of Review

Defendants assert that this action should be dismissed for three reasons: (1) Plaintiff's Complaint fails to state a claim for which relief can be granted; (2) this Court lacks jurisdiction because Plaintiff's claims fail to present a "substantial federal question" invoking federal question jurisdiction; and (3) the claims against Defendants are barred by legislative, Eleventh Amendment immunity and qualified immunity. The standards for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) are discussed below.

I. Fed. R. Civ. P. 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.

The party invoking federal jurisdiction has the burden of proving that by a preponderance of the evidence, jurisdiction exists. *Celli v. Shoell*, 40 F.3d 324, 327 (10th Cir. 1994). A motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) may take two forms. When a defendant makes a facial attack on the complaint's allegations challenging the sufficiency of the complaint, the district court will accept the allegations in the complaint as true. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). If, however, the defendant goes beyond the allegations contained in the complaint and challenges the facts upon which subject matter jurisdiction depends the district court "may not presume the truthfulness of the complaint's allegations." *Id.* at 1003. The court has wide discretion to allow other documents to be considered to resolve the disputed jurisdictional facts. *Id.*

II. Fed. R. 12(b)(6) Motion to Dismiss for Failure to State a Claim.

A federal district court can only dismiss a cause of action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) when it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Yousef v. Reno*, 254 F.3d 1214, 1219 (10th Cir. 2001). The district court must assume all plaintiff's well-pleaded allegations are true and construe them liberally in the light most favorable to the plaintiff. *Conley*, 355 U.S. at 45-46; *Ramirez v. Department of Corrections, Colo.*, 222 F.3d 1238, 1240 (10th Cir. 2000). The district court's function on a Rule 12(b)(6) motion is to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted. *Sutton v. Utah State Sch. for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). In so assessing, the district court is not to weigh potential evidence that might be presented or determine who will ultimately prevail, *see id.*; rather, the issue is whether the plaintiff is entitled to offer evidence to support her claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Discussion

This case presents a myriad of complex issues, many of which are interrelated. Defendants assert three types of immunity which may act as a complete bar to this suit. Defendants further assert that Plaintiff has failed to state a claim for which relief may be granted because Plaintiff's due process and equal protection rights have not been violated. Defendants also contend that Plaintiff's claims

fail to present a substantial federal question which invokes this Court's jurisdiction.

This Court will first discuss the applicability of Eleventh Amendment immunity to the present case, as this issue is dispositive. Eleventh Amendment immunity is a challenge to the subject matter jurisdiction of the district court and must be resolved before a court may address the merits of a claim. *Frazier v. Simmons*, 254 F.3d 1247, 1252 (10th Cir. 2001); *Fent v. Oklahoma Water Resources Bd.*, 235 F.3d 553, 558 (10th Cir. 2000); *Martin v. Kansas*, 190 F.3d 1120, 1126 (10th Cir. 1999). The Court will next address whether Defendants are immune from suit due to absolute or qualified immunity. Third, the Court will discuss whether, based upon the language of the Complaint, Plaintiff has failed to state a claim for which relief may be granted. This discussion will determine, in part, the outcome of Defendants' argument that Plaintiff has failed to present a substantial federal question. Thus, this issue will be discussed in the final section of this Order.

I. Whether the Claims Against Defendants Are Barred by Absolute Immunity, Eleventh Amendment Immunity and Qualified Immunity.

A. The Eleventh Amendment.

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. The United States Supreme Court has consistently interpreted the Eleventh Amendment as barring not only suits against a state by citizens of

another state, but also suits against a state by that state's own citizens. *See Hans v. Louisiana*, 134 U.S. 1, 13-15 (1890); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1187-89 (10th Cir. 1998). Furthermore, the Supreme Court has interpreted the Eleventh Amendment to embody the principle of sovereign immunity. *Hans*, 134 U.S. at 10, 20; *Alden v. Maine*, 527 U.S. 760, 722 (1999). " 'It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*' " *Hans*, 134 U.S. at 13 (emphasis in original) (quoting *The Federalist*, No. 81 (A. Hamilton)). Moreover, the Eleventh Amendment, and the principle of sovereign immunity that it embodies, bars a suit brought against state officials when the state is the real, substantial party in interest.[2] *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984).

However, Eleventh Amendment immunity is not absolute. *See Estes v. Wyo. DOT*, 302 F.3d 1200, 1201 (10th Cir. 2002). The Tenth Circuit has explained that there are "two clearly recognized exceptions to the general immunity protections of the Eleventh Amendment: (1) a state may consent to be sued, or (2) Congress may clearly and expressly abrogate the states' immunity." *Elephant Butte*

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[2] Plaintiff asserts that Eleventh Amendment immunity is not applicable in the present case because he has sued Defendants in their individual capacities rather than their official capacities. Plaintiff's Brief in Response and Objection to Defendants' Motion to Dismiss, pp. 21-24. However, Plaintiff's Complaint states that he is suing Defendants in their "individual and administrative capacities." Complaint, p. 1. This Court believes that suing Defendants in their administrative capacity is synonymous with suing Defendants in their official capacity. Thus, this Court must discuss sovereign immunity to determine whether Plaintiff may proceed with this suit.

Irrigation Dist. of New Mexico v. D.O.I., 160 F.3d 602, 607 (10th Cir. 1998).

In the present case, neither of the above exceptions apply. However, a plaintiff may obtain relief against a state under the *Ex parte Young* doctrine notwithstanding a state's sovereign immunity. *ANR Pipeline Co.*, 150 F.3d at 1188. The landmark case of *Ex parte Young* created a third exception to Eleventh Amendment immunity by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law is not one against the State. *Ex parte Young*, 209 U.S. 123, 159-60 (1908). The general rule that sovereign immunity creates an absolute bar to suit is not applicable if an individual is creating or enforcing an unconstitutional act. The rationale behind the *Ex Parte Young* doctrine is that if the underlying act is unconstitutional, and thus void, enforcement of that act is not authorized and is not taken in an official capacity. Additionally, the United States Supreme Court has explained that "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Thus, "when a party seeks only prospective equitable relief – as opposed to any form of money damages or other legal relief – then the Eleventh Amendment generally does not stand as a bar to the exercise of the judicial power of the United States." *ANR Pipeline Co.*, 150 F.3d at 1188 (citing *Ex parte Young*, 209 U.S. at 158-59).

As noted above, sovereign immunity bars a suit brought against state officials when the state is the real, substantial party in interest. *Pennhurst*, 465 U.S. at 101. Whether the state is the real party in interest turns on the type of relief sought by the plaintiff. *Powder River Basin*

Resource Council v. Babbitt, 54 F.3d 1477, 1483 (10th Cir. 1995). A suit that seeks retroactive relief is barred because in such instances the State, as opposed to the named official, is the real, substantial party in interest. *Id.* A suit that seeks prospective relief, however, is permitted because such a suit is against the official rather than against the sovereign state. *Id.*

The *Ex parte Young* doctrine has several limitations. The Tenth Circuit summarized the limitations on the scope of the *Ex parte Young* doctrine as follows:

> Federal courts lack jurisdiction over suits that seek: (1) to require the state official to comply with state law; (2) to redress past wrongs, rather than ongoing violations; (3) a declaratory judgment from the federal court when the only purpose for such a judgment is its "res judicata effect in a subsequent state-court proceeding;" (4) "an award for monetary relief that is the practical equivalent of money damages, even if this relief is characterized as equitable." *Id.* at 1188-89. In addition, *Ex parte Young* "should not be invoked when Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right," or the requested relief "implicates special sovereignty interests."

Frazier v. Simmons, 254 F.3d 1247, 1253 n. 2 (10th Cir. 2001) (quoting *ANR Pipeline*, 150 F.3d at 188-90) (quotation marks and citations omitted). In the present case, Defendants assert that the *Ex parte Young* exception does not apply because Plaintiff has not sought prospective injunctive relief. In assessing Defendants' contention, this Court "need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as

prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in judgment)). Thus, the primary issue this Court must address is whether the relief sought by Plaintiff will redress past wrongs or will address an ongoing violation of the United States Constitution or federal law.

Plaintiff requests that this Court enter a declaratory judgment declaring that the amendment of Rule 4:(1) constitutes a violation of Plaintiff's right to equal protection pursuant to the Fifth and Fourteenth Amendments to the United States Constitution; (2) constitutes a substantial deprivation of Plaintiff's property without due process of law in violation of the Fourteenth Amendment of the United States Constitution; (3) violated due process of law under the Fourteenth Amendment of the United States Constitution because it does not provide for any adequate and immediate post-deprivation hearing on Plaintiff's preclusion from eligibility to be nominated for the position of Chief Justice; (4) constitutes a substantial deprivation of Plaintiff's liberty interest without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Plaintiff further requests that the amendment to Rule 4 declared to be null and void, of no effect, and unauthorized by law.

Clearly, Plaintiff has not requested retroactive money damages from the state, which are prohibited by the Eleventh Amendment and do not fall within the *Ex parte Young* exception. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974); *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101-02 (1984); *Quern v. Jordan*, 440 U.S. 332, 341 (1979).

The only monetary damages sought are attorney fees, which are not prohibited by the Eleventh Amendment. *See Hutto v. Finney*, 437 U.S. 678, 692 (1978) ("Hence, the substantive protections of the Eleventh Amendment do not prevent an award of attorney's fees against the Department's officers in their official capacities.")

Thus, we must determine whether the relief requested by Plaintiff is retroactive or prospective in nature. "Declaratory judgments are construed as retroactive relief only when '[t]here is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction.' Declaratory relief is prospective when sought to prevent a state's current violation of the law." *Powder River Basin*, 54 F.3d at 1483 (quoting *Green v. Mansour*, 474 U.S. 64, 73 (1985)).

Defendants contend that the relief requested by Plaintiff is retroactive because he has asked that the amended Rule be declared null and void. Defendants state that this relief would retroactively undo the November 2004 election of Justice Watt, because he was made eligible by the amended Rule. Defendants' Motion to Dismiss, p. 19. However, even if a portion of the relief requested would have retroactive effect, this suit is not barred if the relief would also end an ongoing violation of Plaintiff's constitutional rights. Plaintiff claims that his equal protection and due process rights were violated and continue to be violated. Plaintiff has not requested that this Court appoint him to the position of Chief Justice. Rather, Plaintiff has requested that this Court declare Rule 4, as amended, null and void because the rule continues to infringe on his constitutional rights. Thus, this Court believes that Plaintiff has asserted a continuing violation of federal law.

Other cases have presented similar situations in which a plaintiff seeks to "right" a previous wrong. In such cases, it is often asserted that the plaintiff is seeking retroactive relief, which cannot be obtained under *Ex parte Young*. However, until a violation has been corrected, the "wrong" continues, and any relief sought encompasses an ongoing violation of federal or constitutional law. For example, in *Powder River Basin, supra*, the Tenth Circuit determined that a request for declaratory judgment that a Wyoming statute was a continuing violation of the Surface Mining Control and Reclamation Act ("SMCRA") did not seek retroactive relief barred by Eleventh Amendment. *Powder River Basin*, 54 F.3d at 1483. The Tenth Circuit stated:

> Plaintiff alleged in its complaint that Wyoming's attorney's fees provision violated federal SMCRA law. At the time plaintiff brought suit, the allegedly deficient attorney's fees statute was still in effect. Wyo. Stat. § 35-11-437(f) (1988). Thus, plaintiff alleged a continuing violation of SMCRA. Because plaintiff's request sought prospective, as opposed to retroactive, relief, the claim was not barred by the Eleventh Amendment.

Id. Similarly, in the present case, Plaintiff asserts that Rule 4, as amended, violates federal law. This amended version is still in effect, and thus, Plaintiff asserts a continuing violation of federal law.

Defendants also assert that Plaintiff has not claimed that Defendants, in amending Rule 4, were acting under an unconstitutional statute; thus, the *Ex parte Young* exception does not apply. Defendants are correct that the power granting the Oklahoma Supreme Court to create

rules regarding the selection of Chief Justice is not unconstitutional.[3] However, Defendants used this power to create a potentially unconstitutional rule. The policy of *Ex parte Young* is not to shield the creation of unconstitutional rules so long as they are created pursuant to a constitutional statute. Furthermore, once Defendants amended Rule 4, if unconstitutional, any action pursuant to this Rule places them squarely within the *Ex parte Young* exception.

Finally, Defendants claim that the *Ex parte Young* exception is not applicable when the action sought to be enjoined requires the exercise of discretion, in which Defendants were engaged. This argument has previously been addressed by the Tenth Circuit. In *Elephant Butte Irr. Dist. of New Mexico v. Department of Interior*, the Tenth Circuit rejected this argument, stating:

> The state officials also argue the *Ex parte Young* doctrine does not allow the courts to interfere with their discretionary acts. Although this general premise is sound, *Ex parte Young* does not extend this rule to preclude judicial review of discretionary acts that violate federal law. *See* 209 U.S. at 158-59, 28 S.Ct. 441 (holding the state officials' "general discretion regarding the enforcement of the laws . . . is not interfered with by an injunction which restrains the state officer from taking any steps towards the enforcement of an unconstitutional enactment, to the injury of the complainant.").

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[3] The Oklahoma Supreme Court derives its authority to choose a Chief Justice from the Oklahoma Constitution, Article 7, Sec. 2.

Elephant Butte Irr. Dist. of New Mexico v. Department of Interior, 160 F.3d 602, 611 (10th Cir. 1998). *See also Lewis v. New Mexico Dept. of Health*, 261 F.3d 970, 977 (10th Cir. 2001).

Thus, the type of relief sought is proper. Plaintiff has not requested retroactive monetary damages. Plaintiff has requested a declaratory judgment asserting that there is an ongoing violation of federal law. As noted above, Plaintiff maintains that this suit was brought against Defendants in their individual capacity only. This Court previously stated that by asserting a claim against Defendants in their "individual and administrative capacities", we believe that Plaintiff did, in fact, assert a claim against Defendants in their official capacities. However, Eleventh Amendment immunity will not shield Defendants from this suit. This Court **FINDS** that *if* Rule 4, as amended, infringed upon Plaintiff's constitutional rights, Defendants are not entitled to Eleventh Amendment immunity. Instead, this case would fall squarely within the *Ex parte Young* exception to Eleventh Amendment immunity. Of course, this Court cannot definitively state at this time whether Defendants' actions violated Plaintiff's constitutional rights. However, "[t]he function of a motion to dismiss 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.'" *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc.*, 748 F.2d 774, 779 (2d. Cir. 1984) (quoting *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980)). *See also Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). Furthermore, "inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646. Thus, for the foregoing reasons,

Defendants' Motion to Dismiss based upon Eleventh Amendment Immunity is **DENIED**.

B. Absolute Immunity

"Judges are absolutely immune from civil liability for judicial acts, unless committed in the clear absence of all jurisdiction." *Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981) (citing *Stump v. Sparkman*, 435 U.S. 349 (1978)). "'[I]mmunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.'" *Valdez v. City and County of Denver*, 878 F.2d 1285, 1287 (10th Cir. 1989) (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988)). Consequently, "[i]mmunity which derives from judicial immunity may extend to persons other than a judge where performance of judicial acts or activity as an official aid of the judge is involved." *Henriksen*, 644 F.2d at 855.

Similarly, judges may enjoy absolute immunity for acts which are not judicial in nature. In *Forrester v. White*, the United States Supreme Court stated:

> Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.

Forrester v. White, 484 U.S. at 227 (emphasis in original).

In the present case, the Court will for purposes of this argument assume that Defendants were not performing a

judicial function in amending Rule 4.[4] Defendants assert that they were acting in a legislative capacity in amending Rule 4, while Plaintiff asserts that Defendants acted in an administrative capacity. The parties believe the distinction is dispositive. There is no doubt that judges are not entitled to absolute immunity when acting in an administrative capacity. *Id.* at 229; *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997). Whether a judge is entitled to immunity when performing a legislative function has been the subject of great debate since the Supreme Court's ruling in *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980). In *Consumers Union*, the Supreme Court held that "absolute immunity derived from the doctrine of legislative immunity applies to insulate state judges from damages liability arising from court rule-making activities." *Galahad v. Weinshienk*, 555 F.Supp. 1201, 1204-05 (D.C. Colo. 1983) (citing *Consumers Union*, 446 U.S. at 731-34). It is clear that said immunity applies to claims for monetary damages. However, whether legislative immunity should be applied to prospective or injunctive relief has been a point of contention. Fourteen years after the *Consumers Union* decision, the Third Circuit described this issue as follows:

> We note that the Supreme Court has never held that legislative immunity applies to both claims for damages and injunctive relief. A close reading

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[4] While the Court in this opinion will follow the precedents that establish that the function involved herein is either legislative or administrative, the Court is also aware that it could be urged that when the Justices of the Supreme Court of Oklahoma provide a rule for electing Chief Justice, and then do so, they are performing acts mandated by the Oklahoma Constitution, which are therefore acts of judges that are by definition judicial.

> of *Consumers Union* indicates that the Supreme Court merely pointed to an obvious circuit split which existed at the time and we believe, remains unresolved today. There are at least two courts of appeals that have suggested that the Supreme Court has definitively spoken on this issue and has held that absolute immunity is a bar to injunctive relief. *See Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir.), *cert. denied*, 502 U.S. 860, 112 S.Ct. 180, 116 L.Ed.2d 142 (1991); *Alia v. Michigan Supreme Court*, 906 F.2d 1100, 1102 (6th Cir. 1990). However, a substantial number of courts of appeals, including the Third Circuit, believe the issue is unresolved by the Supreme Court, and have held that absolute immunity is a bar to damages only, and not to prospective or injunctive relief. *See Schrob II*, 967 F.2d at 939; *Fry v. Melaragno*, 939 F.2d 832, 839 (9th Cir. 1991); *Chrissy F. v. Mississippi Dep't of Public Welfare*, 925 F.2d 844, 849 (5th Cir. 1991), *cert. denied*, 510 U.S. 1214, 114 S.Ct. 1336, 127 L.Ed.2d 684 (1994); *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1539 (11th Cir.), *cert. denied*, 502 U.S. 810, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991); *Schloss v. Bouse*, 876 F.2d 287, 292 (2nd Cir. 1989).

Acierno v. Cloutier, 40 F.3d 597, 608 (3rd Cir. 1994).

In reviewing Tenth Circuit decisions, this Court believes that the Tenth Circuit has indicated its intention to extend legislative immunity to the present situation. In *Fry v. Board of County Com'rs of County of Baca, State of Colo.*, 7 F.3d 936, 937 (10th Cir. 1993), the plaintiffs claimed the right to damages and injunctive relief under

42 U.S.C. § 1983.[5] The district court had granted summary judgment for defendants, finding that they were entitled to absolute legislative immunity. The Tenth Circuit held that legislative immunity was absolute, and thus, summary judgment was appropriate. *Id.* at 942. Although the *Fry* court did not specifically address whether legislative immunity applied to declaratory or injunctive relief, we may infer that the Tenth Circuit intends it to be so, as it upheld the granting of summary judgment as to *both* the claim for damages *and* the claim for injunctive relief. Thus, this Court believes that when performing a legislative function, a judge is entitled to absolute immunity.

Therefore, the Court cannot escape determining whether Defendants' actions were legislative or administrative in nature.

As noted above, the Supreme Court has stated that it applies a "functional" approach to determine immunity questions. *Forrester*, 484 U.S. at 224. "Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Id.*

Defendants were engaged in rulemaking when the alleged discriminatory action occurred. Defendants argue

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[5] The Court notes that the present case is not factually similar to the issue in *Fry*. Furthermore, as Plaintiff has stated, Plaintiff has not brought this action pursuant to § 1983, as did the plaintiffs in *Fry*. However, the relevant inquiry is whether the Tenth Circuit would extend legislative immunity to situations in which declaratory or injunctive relief is sought. The Court believes this question is answered in *Fry*.

that the *Consumers Union* decision, *supra*, requires this Court to find that the adoption of rules is a legislative function, and therefore, Defendants are protected by legislative immunity. Defendants' Motion to Dismiss, p. 14. In *Consumers Union*, the Virginia Supreme Court had promulgated disciplinary rules for the Virginia Code of Professional Responsibility. *Consumers Union*, 446 U.S. at 721. This is not similar to the case at hand because the rules enacted in *Consumers Union* had a widespread impact affecting anyone who practiced law in Virginia. Defendants also cite two other cases in which persons who had enacted rules or ordinances were entitled to legislative immunity.[6] Generally, these cases are more similar to the present case as the immediate impact of the act was limited to one individual. *See Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983) (mayor and borough attorney entitled to legislative immunity when ordinance passed eliminated plaintiff's job position); *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (mayor who proposed ordinance terminating a division in which plaintiff was the sole employee was entitled to legislative immunity). In these cases, it was significant to the courts that the actions had "prospective implications that reach well beyond the particular occupant of the office." *Bogan*, 523 U.S. at 56.

We believe that the actions in those cases involved decisions which the individual actor did in the ordinary course of business. For example, in *Bogan, supra*, the

[6] Additionally, Defendants cite two cases which are similar to the *Consumers Union* case as the cases involve legislative immunity as applied to Justices' who adopted rules or issued an Order with a widespread impact. The Court need not discuss these cases, as we have already stated that this type of broad issuance is not present in the case before this Court.

mayor, Daniel mayor, Daniel Bogan, had proposed the elimination of several employees, including plaintiff, as part of his budget proposal. *Bogan*, 523 U.S. at 47. Bogan, as the elected mayor, was required to submit a budget proposal. Thus, it was clear that legislative immunity should apply in such a case since the "purpose of [legislative] immunity is to insure that the legislative function may be performed independently without fear of outside interference." *Consumers Union*, 446 U.S. at 731.

"[A]t its core, the legislative function involves determining, formulating, and making policy." *Kamplain v. Curry County Bd. of Com'rs*, 159 F.3d 1248, 1251 (10th Cir. 1998). As further support for their contention that they should be granted legislative immunity, Defendants contend that matters addressed by Rule 4, such as the length of the Chief Justice's term and eligibility determinations, are policy issues. To the contrary, it can be argued that Defendants were engaged in internal rulemaking – the sole effect of which would impact the nine current members of the Oklahoma Supreme Court.[7]

The amended rule, if retained, will arguably affect future members of the Oklahoma Supreme Court as well. Nonetheless, the Court believes that the stated purpose of

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[7] Defendants correctly note that the selection of Chief Justice may impact parties outside of the Oklahoma Supreme Court. Defendants' Response to Plaintiff's Amended Supplemental Brief, p. 2. However, while the selection may impact the public, it cannot truly be said that the rule itself has a substantial impact on the public. Defendants argue that under Rule 4, four Justices were eligible for the selection of Chief Justice, whereas under Rule 4 as amended, five Justices were eligible for the selection of Chief Justice. The addition of one Justice from which the other Justices may choose Chief Justice likely has very little impact on the public.

legislative immunity does not apply in this situation. Nor is this a situation in which policy is at issue. In *Kamplain, supra*, the Curry County Board of Commissioners ("Board") voted to ban Mr. Kamplain from future meetings. The Court held that since "the circumstances of this case did not concern the enactment or promulgation of public policy", the ban was not related to any legislation or legislative function. *Id.* at 1253. Legislative immunity was not appropriate because the Board members were not "voting on, speaking on, or investigating a legislative issue." *Id.* The Tenth Circuit held that, although the Board acted during a regularly scheduled meeting, the acts were of an administrative nature. *Id.*

In *Forrester, supra*, the Supreme Court held that absolute immunity would not be afforded a judge who demoted and discharged an employee in violation of 42 U.S.C. § 1983. *Forrester v. White*, 484 U.S. at 229. Clearly, this is not similar to the case at hand, in which Defendants did not terminate Plaintiff, but rather amended an existing rule, the effect of which is undetermined. However, the characterization of such issues is enlightening. The Supreme Court stated "[Employment] decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983." *Id.* This too is a personnel decision and suggests that legislative immunity would not arise in the present situation, which involves the amendment of a rule governing internal procedures. It is also consistent with the Oklahoma Statute which excludes "statements and memoranda concerning only the internal management of an agency and not affecting private rights

or procedures available to the public" from the definition of "rule". 75 Okla. Stat. Tit. 20, § 250.3(15)(c) (2002).

Again, this Court notes that none of the above examples fits squarely within the present issue. Had this exact issue been previously litigated and determined, this case might not be before this Court. Recognizing this fact, we are forced to determine whether this action was legislative or administrative based upon the reasoning in analogous cases. A review of the history and policy behind legislative immunity has enabled us to reach the conclusion that Plaintiff's argument is persuasive. The adoption and amendment of Rule 4 is not subject to outside interference by the public. Rather, the rules, as Plaintiff notes, "are simply house-keeping rules, designed to facilitate the orderly internal management of the Supreme Court. . . . The promulgation and amendment of Rule 4 does not arise out of a need to regulate conduct for the protection of all citizens." Plaintiff's Brief in Response and Objection to Defendants' Motion to Dismiss, p. 19. This is not a situation in which the Justices' actions should be protected out of fear that a lack of immunity will undermine the integrity of the Oklahoma Supreme Court. It is a situation, however, which warrants a remedy if the amendment of Rule 4 was undertaken for the purposes Plaintiff describes.

As the *Forrester* court noted, the Supreme Court "has been careful not to extend the scope of the protection [of legislative immunity] further than its purposes require." *Forrester*, 484 U.S. at 224. We decline to extend that doctrine to the present case. Thus, for the foregoing reasons, Defendants' Motion to Dismiss based upon Absolute Immunity is **DENIED**.

C. Qualified Immunity

The doctrine of qualified immunity "is designed to shield public officials from liability and ensure that erroneous suits do not even go to trial." *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995) (internal quotation marks and citations omitted). "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

However, there are some situations, such as this one, in which qualified immunity simply does not apply. Qualified immunity does not apply to claims which solely seek equitable relief, i.e. declaratory and injunctive relief. *See Kikumura v. Hurley*, 242 F.3d 950, 962-63 (10th Cir. 2001) (qualified immunity did not apply where the primary relief sought was a permanent injunction); *Cannon v. City and County of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) ("Unlike the claim for money damages, there is no qualified immunity to shield the defendants from claims for [declaratory and injunctive] relief."); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) (qualified immunity does not bar actions for declaratory or injunctive relief).

In oral arguments, Defendants conceded that the above cases stand for the proposition that qualified immunity does not apply if the sole relief sought is an equitable remedy. However, Defendants assert that the above cases ultimately relied on *Harlow v. Fitzgerald, supra*, in which

the defendants were federal, not state, officials.[8] Accordingly, the Supreme Court did not have to contend with the issue of Eleventh Amendment immunity since the actors were federal officials. Since this case involves state officials, Defendants argue the result is an overlap of immunities in which qualified immunity becomes intertwined with Eleventh Amendment immunity. However, the basis for this argument is Defendants' belief that Plaintiff solely requests retroactive relief, which is barred by the Eleventh Amendment. We have previously determined that Plaintiff has requested a declaratory judgment asserting that there is an ongoing violation of federal law; therefore, Eleventh Amendment immunity does not bar this action. Thus, the overlap of immunities is not an issue.

It is clear that Plaintiff does not seek monetary damages. Qualified immunity does not bar actions for equitable relief, which is the type of relief sought by Plaintiff. Therefore, Defendants' Motion to Dismiss based upon Qualified Immunity is **DENIED**.

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[8] It is unclear whether Defendants are arguing that the Tenth Circuit's reliance on *Harlow v. Fitzgerald* and *Presbyterian Church (U.S.A.) v. United States* was misplaced or whether Plaintiff's interpretation of this case law is erroneous. *Cannon v. City and County of Denver*, the Tenth Circuit case which stated that qualified immunity does not apply to actions for equitable relief, involved two police officers employed by the Police Department of the City and County of Denver. *Cannon*, 998 F.2d at 869. Obviously, the Tenth Circuit has determined that the bar to qualified immunity applies to both state and federal employees.

II. Whether Plaintiff's Claims Fail to Present a "Substantial Federal Question" Invoking Federal Question Jurisdiction.

Defendants' argument that Plaintiff has failed to present a claim involving a substantial federal question is based primarily upon the assertion that the language of Rule 4 contradicts the allegations of the Complaint. Defendants assert that the language of Rule 4 is controlling; thus, this case should be dismissed because on its face, Rule 4 does not violate either due process or equal protection. This issue will be discussed in this section. The issue of whether Plaintiff's claims of equal protection and due process violations should be dismissed will be addressed in the next section.

A motion to dismiss requires the court to assume plaintiff's allegations are true and construe them liberally in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Generally, however, an exception to this rule exists if the allegations contained in the Complaint are contradicted by documents made part of the Complaint. In that situation, the documents control, and the Court need not accept the contradicted allegations as true. *Sazerac Co., Inc. v. Falk*, 861 F.Supp. 253, 257 (S.D.N.Y. 1994). Defendants cite several cases in support of this general rule. *See Olpin v. Ideal Nat'l Ins. Co.*, 419 F.2d 1250, 1255 (10th Cir. 1969); *Zeligson v. Hartman-Blair*, 126 F.2d 595, 596 (10th Cir. 1942); *Fayetteville Investors v. Commercial Buildings Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991); *Ott v. Home Savings and Loan Ass'n.*, 265 F.2d 643, 648, n. 1 (9th Cir. 1958); *Matusovsky v. Merrill Lynch*, 186 F.Supp.2d 397, 400 (S.D.N.Y. 2002); *Scott v. Performance Contractors, Inc.*, 166 F.R.D. 372, 374 (M.D. La. 1996); *Sazerac*, 861 F.Supp. at 257.

These cases are distinguishable from the present case. *Olpin, Zeligson, Fayetteville Investors, Ott*, and *Sazerac* involved a contract or agreement in which an interested party attempted to enforce the contract. In *Matusovsky*, the document at issue was a release signed by the plaintiff in which he released the defendants from all claims that had arisen prior to September 22, 2000, the date of the release. *Matusovsky*, 186 F.Supp.2d at 399. This is similar to the cases above, in which the parties voluntarily entered into a contract. In *Scott*, the attached document was an EEOC charge claiming a Title VII violation. *Scott*, 166 F.R.D. at 373. In *Scott*, the plaintiff stated that she complied with the requirement that her complaint must be filed within 180 days of the date of the EEOC charge. *Id.* at 374. The date on the EEOC document clearly contradicted this assertion. *Id.*

The distinguishing characteristic of each of the above documents is that the clear language of the documents governed the claims at issue. If the language of a contract is clear on its face, a contract dispute can easily be disposed of by examining the contract itself. In those cases, the documents prevailed because the language governing the agreement between the parties was clear. Similarly, the language of a release giving up all claims that occurred prior to the date of the release could immediately determine whether the action before the court was barred by the release. Finally, when the date of an EEOC charge clearly indicated that the plaintiff's complaint was not filed within the proper period, it is obvious that the court need only look to the EEOC charge rather than the contradictory allegations set forth in the complaint.

In this situation, however, Plaintiff has not contended that the language of either version of Rule 4 governs the

way in which the Chief Justice is selected.[9] In fact, Plaintiff contends that the requirements of Rule 4 were never actually followed. According to Plaintiff, the Justices did not vote on the successor, as required by Rule 4. Instead, the Vice Chief Justice simply succeeded to the position if he or she chose to do so. As support for this contention, Plaintiff notes that nearly every Vice Chief Justice since 1960 has succeeded to the position of Chief Justice.[10] Defendants argue that the history is irrelevant since Rule 4 did not take effect until 1999. This Court, however, believes that the history has a great deal of relevance as it clearly establishes that from 1960 to 1999, the time at which Rule 4 was enacted, the Oklahoma Supreme Court consistently allowed the Vice Chief Justice to succeed to the Chief Justice position. If that history had changed upon the adoption of Rule 4, the history may be irrelevant. However, even after the adoption of Rule 4, which required the election of Chief Justice according to certain standards, the pattern of succession remained the same. If Plaintiff's allegations are true, then the construction of Rule 4 is meaningless because Rule 4 was not followed.

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[9] Plaintiff contends that "the Justices of the Supreme Court never held a democratic vote for Chief Justice among those literally eligible for the office." Plaintiff's Brief in Response and Objection to Defendants' Motion to Dismiss, p. 9. The language of Rule 4 is irrelevant if no "election" ever occurred, as required by the Rule, because the Vice Chief Justice simply rose to the level of Chief Justice upon the expiration of the Chief Justice's term. The language of Rule 4 as amended, however, ultimately allows the Chief Justice to succeed himself. Similarly, if no vote is held, the language of amended Rule 4 is irrelevant except that instead of allowing the Vice Chief Justice to automatically succeed to the Chief Justice position, it allows the current Chief Justice to remain in the position.

[10] Justice Lavender was the only Justice who did not become Chief Justice after holding the Vice Chief Justice position from 1994-1996.

This also renders Defendants' arguments regarding the eligibility of several Justices under either version of the Rule meaningless.

Thus, we have a situation which requires us to determine whether the document controls in a situation in which the document, i.e. Rule 4, was allegedly not followed in practice. The Court believes that in this type of situation, granting dismissal based solely upon the language of the Rule is not appropriate since it is unknown whether the voting requirements of Rule 4 were actually followed. At this point, we are simply unable to ascertain the real effect of Rule 4 in its original form or as amended. The issue before this Court cannot be disposed of by merely reviewing the language of Rule 4. The Court is unwilling to dismiss this case when so many important facts remain unknown. Thus, dismissal is not appropriate at this time. Accordingly, Defendants' Motion to Dismiss based upon the Failure to Present a "Substantial Federal Question" Invoking Federal Question Jurisdiction is **DENIED**.

III. Whether Plaintiff's Complaint Fails to State a Claim for Which Relief Can Be Granted.

Defendants contend that Plaintiff can assert neither a claim for violation of due process nor a claim for violation of equal protection. The majority of Defendants' argument is based upon the contentions previously disposed of by the Court. The remainder of these arguments are addressed in turn.

A. Due Process.

"To determine whether an individual was denied procedural due process, 'courts must engage in a two-step

inquiry: (1) did the individual possess a protected interest such that the due process protections were applicable; and, if so, then (2) was the individual afforded an appropriate level of process.'" *Hatfield v. Board of County Comm'rs*, 52 F.3d 858, 862 (10th Cir. 1995) (quoting *Farthing v. City of Shawnee*, 39 F.3d 1131, 1135 (10th Cir. 1994)). The plaintiff must demonstrate that he had a protected property or liberty interest. *Watson v. University of Utah Medical Center*, 75 F.3d 569, 577-78 (10th Cir. 1996). "Protected property interests arise, not from the Constitution, but from state statutes, regulations, city ordinances, and express or implied contracts." *Dill v. City of Edmond, Okl.*, 155 F.3d 1193, 1206 (10th Cir. 1998) (citing *Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 536 (10th Cir. 1995)). "A person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (internal quotation omitted).

Plaintiff asserts that he had a legitimate claim of entitlement to the Chief Justice position under the old version of Rule 4 because traditionally, no democratic vote actually occurred, which allowed the Vice Chief Justice to succeed to the Chief Justice position if he or she chose to do so. As stated previously, it is presently impossible to ascertain the effect of Rule 4 or its amendment. However, if Plaintiff's contentions are correct, it is possible that a "mutually explicit understanding" regarding the succession of Vice Chief Justice to the Chief Justice position could give rise to a property interest. Since we cannot definitively state at this time whether Plaintiff had a

property interest in the Chief Justice position, dismissal is not appropriate.

B. Equal Protection

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Generally, the Equal Protection Clause is applied to claims of class-based discrimination. *Campbell v. Buckley*, 203 F.3d 738, 747 (10th Cir. 2002). In the present case, Defendants correctly note that the language of Rule 4, as amended, does not establish any type of classification which would prevent Plaintiff from becoming Chief Justice. Additionally, the evidence currently before this Court does not suggest that any broad classification, such as age, was the motivation behind the amendment to Rule 4.

However, a successful equal protection claim may be brought by a "'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (citations omitted). Thus, a plaintiff need not allege he is part of a suspect class or implicate a fundamental right to state a claim under the Equal Protection Clause. *See Bartell v. Aurora Public Schools*, 263 F.3d 1143, 1149 (10th Cir. 2001). However, Plaintiff still must prove that he was singled out for persecution due to some animosity by the Justices. *Id.*

Plaintiff must show that the action taken by the Justices was a "'spiteful effort to "get" [him] for reasons wholly unrelated to any legitimate state objective.'" *Id.* (quoting *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995)). Plaintiff must also demonstrate that he was treated differently than others similarly situated. *Id.*

Plaintiff asserts that the amendment to Rule 4 was created for the sole purpose of preventing him from succeeding to the Chief Justice position upon the termination of Chief Justice Watt's term. As noted above, until the effect of Rule 4 prior to its amendment and Rule 4 as amended can be determined, it is not possible to determine whether Plaintiff's allegations have merit. Therefore, Defendants' Motion to Dismiss based upon the Failure to State a Claim for Which Relief Can Be Granted is **DENIED**.

Conclusion

For the foregoing reasons, **IT IS THEREFORE ORDERED** that Defendants' Motion to Dismiss is **DENIED**.

As the foregoing discussion indicates, discovery will have to occur and then at least some of these arguments will be reasserted by way of summary judgment motion. The issues of whether or not there was an actual vote upon the rule change and an actual election seem to require explanation. For that reason, the Court will allow the parties to engage in discovery for a period of ninety (90) days from this date. Meanwhile, Defendants shall answer Plaintiff's Complaint within twenty (20) days. Defendants may file their motion for summary judgment, with accompanying brief on or before August 28, 2005 and Plaintiff

may respond thereto, with his brief, twenty (20) days thereafter. The Court will then set the matter for hearing.

Dated this 20th day of May, 2005.

/s/ Clarence A. Brimmer
CLARENCE A. BRIMMER
UNITED STATES DISTRICT
COURT JUDGE